SUPREME COURT, U. S.

No. 638

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

CHENG FAN KWOK, Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE

WILLIAM H. DEMPSEY, JR.
Amicus Curiae

Of Counsel:
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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BRIEF FOR AMICUS CURIAE

INTEREST OF AMICUS CURIAE

In reply to the petition for *certiorari*, respondent joined petitioner in asking that this Court hear the case, stated that it agreed with petitioner on the merits, and suggested that in the circumstances the Court might wish to appoint an *amicus curiae* to present an argument in support of the judgment of the Court of Appeals. In its order granting *certiorari*, 390 U.S. 918, the Court invited this *amicus curiae* to perform that role.

QUESTION PRESENTED

Whether Section 106(a) of the Immigration and Nationality Act, vesting in the courts of appeals exclusive jurisdiction to review all "final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act," applies to an administrative denial of a stay of deportation that was not entered in a proceeding under Section 242(b).

STATEMENT

The statement of the case by respondent, the Immigration and Naturalization Service (hereinafter "INS"), is correct. Since in our argument we stress the differences between the procedure followed in a Section 242(b) deportation proceeding, 66 Stat. 208 (1952), 8 U.S.C. 1252(b), and the procedure followed by the INS in taking action outside such a proceeding, we add to respondent's statement the following:

Petitioner's request for a stay of deportation consisted of a one page form (A. 9a), to which was annexed a two page form (A. 10a-11a) in which he stated his grounds for seeking classification as a refugee under Section 203(a)(7), 8 U.S.C. (Supp. II) 1153(a)(7). So far as appears, these documents were not prepared by counsel, since there was no signature in the blocks reserved for "Person Preparing Form, If Other Than Applicant." The "order" denying the stay consisted of a brief letter from the Acting District Director to petitioner stating that petitioner was "ineligible to apply for adjustment of status in the United States" because he had "gained entry into the United States as a crewman" (A. 6a).[1] Nothing in the application disclosed that petitioner had gained entry in this fashion or, for that matter, that he

[1] Respondent believes that there was a "manifest lack of merit" in petitioner's application (Br. p. 19). Since the only issue here is whether the court of appeals or the district court should pass upon petitioner's claim, we do not discuss the merits of his application.

had been a crewman. But these three papers comprise the entire written record respecting the stay proceeding before the Acting District Director. Accordingly, the District Director's Office either secured and relied upon the file of the Section 242(b) deportation proceeding or obtained this extra-record information through oral conversations. If there were oral conversations between petitioner or a representative of his and the Office of the District Director, they were not recorded.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a 1961 statute that has generated a singular contrariety of opinion in the lower courts and that accordingly has already been twice considered by this Court. The statute, Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105(a), 75 Stat. 651 (1961), was designed to change the pattern of judicial review of deportation and exclusion cases in several respects. The focus of the litigation has been upon that provision in the statute, subsection (a), that requires direct appeal to the courts of appeals of "all final orders of deportation" that are "made . . . pursuant to administrative proceedings under section 242(b) of this Act." Previously, INS orders had been reviewable in the first instance only by the district courts under the general grant of jurisdiction of Section 279 of the Immigration and Nationality Act of 1952, 66 Stat. 230, 8 U.S.C. 1329.[2]

The prior decisions of this Court settled a pervasive controversy concerning the first of these statutory phrases—"final orders of deportation"—but the Court was not required to decide the meaning of the second—orders "made . . . pursuant to administrative proceedings under section 242(b) of this Act." In *Foti v. Immigration & Naturalization Service*,

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[2] "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title . . . ." See *Lam Man Chi v. Bouchard*, 314 F.2d 664, 666 n. 2 (3d Cir. 1963).

375 U.S. 217, this Court held that an order denying discretionary suspension of deportation, though not literally an "order of deportation," fell within that statutory phrase. But the decision by the INS respecting that type of discretionary relief had by regulation been made during the Section 242(b) deportation proceeding. Therefore, the decision in *Foti* does not control with respect to whether orders denying discretionary relief, but entered entirely outside a Section 242(b) deportation proceeding, can be considered to have been "made . . . pursuant to proceedings under section 242(b)." Nor did the Court's subsequent decision in *Giova v. Rosenberg*, 379 U.S. 18, settle the question, for that case involved a denial of a motion to reopen a Section 242(b) proceeding.

It is this issue—whether courts of appeals have jurisdiction under Section 106(a) to review directly INS orders that may affect a deportation order but that are taken outside a Section 242(b) proceeding—that is presented in this case. The denial of a stay to petitioner probably was sufficiently related to the deportation order so that, under *Foti*, it would have been directly appealable to the court of appeals under Section 106(a) if it had been entered in a Section 242(b) proceeding.[3] But it was not issued in such a proceeding. The lower court held that, in such circumstances, it was without jurisdiction because of the Section 106(a) limitation to orders made "pursuant to administrative proceedings under section 242(b)." The lower court's construction of

[3] It perhaps could be argued that the order here is distinguishable from the order in *Foti* because the relief sought by petitioner, if granted, would have required merely a change in the date of deportation. (Petitioner sought a stay only "pending a determination of [his] classification as a refugee" and stated that he would "depart from the United States as soon as . . . [his] classification is determined" (A. 9a).) Such an approach was suggested in *Tai Mui v. Esperdy*, 371 F.2d 772, 776-777 (2d Cir. 1966). However, it was not suggested by the lower court in the case at bar, and we do not urge it. If respondent's basic analysis of the statute were to be accepted by this Court, we believe that no distinction should be drawn among the various types of orders that have a substantial bearing upon the deportation order, but rather that all such orders should be subject to direct appeal.

the statute is squarely supported by the Second and Ninth Circuits and less clearly by the Fifth, while it is opposed by the Sixth and Seventh Circuits.[4] Petitioner and respondent urge this Court to adopt the view of the latter courts.

Respondent does not really dispute that the statutory language is a considerable obstacle to its position.[5] Respondent's contention that the obstacle can be overcome rests basically upon its view that it would be unreasonable to "make the application of the statute dependent on form rather than substance" (Br. p. 17), and that accordingly such a purpose should not be ascribed to the Congress. Rather, says respondent, the touchstone should be the Congressional determination to obviate delay and obstruction in deporting aliens, a policy that is impaired by the traditional method of initial review by a district court with appeal to a court of appeals, but that would be promoted if "the critical consideration [for court of appeals direct review] is the relationship of the administrative determination of which review is sought to the basic deportation order, rather than the identity of the official who acted on the application" (Br. p. 25).

While such a "substance over form" principle may have an appealing ring, as a guideline for solving the particular problem at hand it does not withstand careful examination for the following reasons:

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[4]The cases are identified and classified in respondent's brief at pp. 32-33. We disagree with respondent's reading of *Rose v. Woolwine*, 344 F.2d 993 (1965), on the basis of which respondent places the Fourth Circuit in opposition to the court below. Insofar as here relevant, that case involved a refusal by the special inquiry officer to reopen the Section 242(b) proceedings. Accordingly, in that respect under *Giova* the order was sufficiently related to the Section 242(b) proceeding to come within Section 106(a).

[5]Petitioner's position is identical to respondent's. Since respondent's discussion is more detailed, and for the sake of simplicity, we direct our response in terms to the arguments of respondent.

I

The language of the statute is plain. The restriction of direct review to orders made "pursuant to administrative proceedings under section 242(b)" cannot reasonably be read to permit direct review of orders entered wholly outside the context of a Section 242(b) deportation proceeding. Respondent's suggestion that this phrase was designed merely to insure that Section 106(a) review would not be available in *exclusion* cases, as opposed to deportation cases, is not tenable. The language is not apt for that purpose. Moreover, the Congress knew how to speak clearly to this subject. Section 106(b) unequivocally states that an alien involved in the exclusion proceeding "may obtain judicial review . . . by habeas corpus proceedings and not otherwise."

II

The opinion in *Foti v. Immigration & Naturalization Service, supra,* strongly supports the lower court's interpretation of Section 106(a). In *Foti*, this Court repeatedly stressed that the order in that case had been entered in a Section 242(b) proceeding; and in a lengthy footnote addressed to an argument advanced by the lower court, this Court observed that an order that had *not* been entered in a Section 242(b) proceeding "presumably" would not be appealable under Section 106(a). Nor is the force of the *Foti* opinion mitigated by the subsequent *per curiam* decision in *Giova v. Rosenberg, supra.* That decision stands only for the rule that a motion to reopen a Section 242(b) proceeding is sufficiently related to that proceeding to fall within Section 106(a), just as a denial of a motion for a new trial would be appealable together with the final judgment of a district court.

III

Apart from the *Foti* opinion, there is good reason to accord Section 106(a) its most obvious meaning. Other direct review statutes, including the Hobbs Act which Section 106(a) explicitly incorporates, apply generally, if not invariably, only to orders that are entered pursuant to quasi-judicial type administrative proceedings. Where there are such proceedings, there is an adequate basis upon which a court of appeals can act, including an adequate evidentiary record upon which to appraise material issues of disputed fact. The legislative history of some of these provisions indicates that this consideration was one of the reasons for permitting direct review by the courts of appeals. Moreover, because of the problems that may beset courts of appeals in attempting to review agency orders in the absence of trial-like administrative procedures, courts have construed direct review statutes as dependent upon such proceedings. *E.g.*, *United Gas Pipe Line Co. v. Federal Power Comm'n*, 181 F.2d 796 (D.C. Cir. 1950), *cert. den.*, 340 U.S. 827.

By analogy, Section 106(a) is reasonably restricted to orders entered in the context of a Section 242(b) proceeding, since only Section 242(b) guarantees the type of hearing—notice, the right to representation, the right to adduce evidence and to cross-examine—traditionally associated with a quasi-judicial proceeding. Without the sort of record such a hearing produces, the courts of appeals will in many situations be unable intelligently to determine whether the order under attack is sustainable.

Moreover, the relevant legislative history, while scant, tends to support this view of the scope of Section 106(a). In defending the provision against the charge that the INS proceedings would not produce a record adequate for court of appeals review, Representative Walter, the principal author and advocate of the bill, pointed to the procedural provisions of Section 242(b). In contrast, the legislative history cited by respondent is beside the point. The colloquy among Representatives Walter, Lindsay, and Moore, if anything,

supports our position; and the chart appended to the committee reports cited by respondent was simply a catalog of all possible steps in a deportation case without reference to the reach of Section 106(a).

IV

Affirmance of the lower court's judgment would not have unfortunate practical consequences. To the extent that judicial review would be prolonged, this is the price the statute exacts for the benefits of restricting direct review to its traditional role *i.e.*, review of orders arising out of quasi-judicial agency proceedings. In addition, the problem of delay is not as significant as in *Foti*, since most types of discretionary relief are now by regulation applied for during the Section 242(b) proceeding. If the INS thinks it necessary, it can complete the amendment process and place within the Section 242(b) context all issues of discretionary relief, such as applications for stays. Under *Foti*, all such determinations will then fall under Section 106(a). This would not only eliminate delay, but would obviate the possibility that appeals of INS actions will be bifurcated, with some issues going to the district court and others simultaneously to the court of appeals. Absent such amendment of the regulations, bifurcation may also be prevented by application of the doctrine of ancillary jurisdiction, so that if a Section 106(a) order is appealed to the court of appeals, that court would acquire jurisdiction of those issues which otherwise would have to be litigated in the district court. Finally, bifurcation may not in any event be particularly serious. The court of appeals could simply hold the Section 106(a) petition until the district court acts and then consolidate any appeal with the Section 106(a) petition.

On the other hand, certain practical considerations support the lower court's decision. A reduction of burden on the courts of appeals may be one, although the data available are not entirely persuasive. But it does seem clear that the lower court's rule, which focuses upon the consideration

whether an order is entered in a Section 242(b) proceeding, is a simpler test than respondent's, which turns upon the less objective consideration whether the order is sufficiently related to the deportation order. In view of the unfortunately extended history of litigation respecting Section 106(a), there is much to be said for the adoption of as simple a rule as possible.

Moreover, if direct appeal turns upon whether orders are entered in the context of a Section 242(b) proceeding, there may be an incentive for the INS to amend its regulations in the fashion described above so that as many discretionary determinations as possible are made during that proceeding. This consolidation of issues in the deportation proceeding in turn would reduce the opportunity for multiple ligitation, since all of the consolidated issues could be resolved in a single petition at the termination of the deportation proceeding. And multiple litigation was one of the concerns of the Congress when it enacted Section 106(a).

V

Respondent's contentions are advanced against the background of its belief that the Congress regarded Section 106 (a) as the primary 1961 provision for expediting litigation in deportation cases. Even if that is an accurate appraisal of the Congress' view, the considerations already discussed establish another, and controlling, purpose to restrict direct review to orders entered within the context of Section 242 (b) proceedings. But in point of fact respondent overemphasizes the significance of Section 106(a). The legislative history of the statute establishes that the Congress regarded the principal evil as the institution by aliens of successive lawsuits attacking various aspects of INS action, not the traditional exercise of the right to appeal from a determination of the district court. Accordingly, the Congress regarded as most important the Section 106 provisions respecting the applicability of *res judicata*, the 6 months statute of limitations, and the exhaustion of administrative remedies, not the direct review provision.

ARGUMENT

I.

THE LANGUAGE OF SECTION 106(a) STRONGLY SUPPORTS THE DECISION BELOW.

The denial of a stay to petitioner was not made in the Section 242(b) proceeding or even by the special inquiry officer who had conducted that proceeding. Rather, the Section 242(b) proceeding had ended and the stay was denied by an Acting District Director. Nor was the decision subject to review by the Board of Immigration Appeals (8 C.F.R. 243.4), as are determinations made by the special inquiry officer in a Section 242(b) proceeding (8 C.F.R. 242.21). The question is whether nonetheless it can be said that the denial of the stay was an order "made . . . pursuant to administrative proceedings under section 242(b)"—the decisive phrase in Section 106(a). The argument that it cannot, that an order "made . . . pursuant to administrative proceedings under Section 242(b)" must be made in the context of a Section 242(b) proceeding, is on such a primary level of interpretation that it is hardly subject to useful amplification beyond recitation of the statutory terms. At least, if there is a more sophisticated argument available, it has not occurred to us.

The burden of explanation, of pointing to an ambiguity in the statute, is respondent's. Before examining respondent's version of the statutory language, we note that respondent in this case reverses the position it took in *Foti* and *Giova*. There, respondent declared that Section 106(a) should be read precisely as it was in the case at bar by the lower court. Thus, in discussing the question whether there could be direct review of a type of order that, like the denial of a stay here, had been made by a District Director after the close of the Section 242(b) proceedings, respondent stated:

> Concededly, if these words [of the statute] are to be followed faithfully, it is difficult to see how the section can be construed to extend to a determina-

> tion made *subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation. [*Foti* Br. p. 48. See also *Giova* Br. pp. 16-17. (Italics in original.)]

This marks with absolute precision the position we take here. Respondent said in *Foti* that it had arrived at this view of the statute "with considerable reluctance, since the *spirit* of Section 106(a), particularly as illumined by its legislative history . . ., suggests that it may well have been the wish of Congress to remove all issues having any connection whatever with the deportation of aliens from the district courts and place them in the courts of appeals." The trouble, however, was that "if that indeed was what Congress intended, the language it employed was, in this particular respect, inadequate" (Br. pp. 47-48).

Respondent frankly acknowledges that its position in the case at bar represents a change of mind (Br. p. 16). Certainly both the Solicitor General and the INS are free to reconsider the view they expressed in *Foti*, but when they do so they invite comparison between the force of their prior and current analyses. The prior analysis, described above, was simple and direct. The current analysis is, we suggest, considerably less satisfactory.

Respondent proffers one alternative reading of the statutory language and one reason for ignoring it. First, respondent says that the term "pursuant" can be given a broader reading than the term "in," so that the phrase "orders . . . made . . . pursuant to administrative proceedings under section 242(b)" can be construed to "include orders relating to the execution of the basic deportation order" even though those orders are not made by a special inquiry officer in a Section 242(b) proceeding (Br. p. 24). This puts too heavy a load on "pursuant." If the Congress meant to say that there should be direct review of all orders "relating to the execution of the basic deportation order" even though, to

use respondent's language in its *Foti* brief, those collateral orders are made "*subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), [and] by an official *other than* the special inquiry officer who presided over the deportation proceedings," the Congress would hardly have expressed that intention by conferring jurisdiction only over orders made "pursuant to administrative proceedings under section 242 (b)."

Next, respondent suggests that "the reason the language in question was added was to make certain that the proposed review procedure would not be applicable to *exclusion* proceedings barring aliens seeking entry into the United States, as distinguished from *deportation* proceedings relating to aliens already in the country" (Br. 23). Conceivably if the legislative history clearly established that this was the only function the phrase was designed to perform, its apparent limitation of the scope of Section 106(a) to orders entered in the context of Section 242(b) proceedings could be disregarded. But there is no legislative history to that effect at all, only respondent's speculation. Moreover, that speculation has obvious weaknesses. First, it is hard to believe that the Congress as a whole, the subcommittee that worked with this legislation for years, and Representative Walter who was principally responsible for it and who certainly understood immigration law, could have been oblivious to the fact that the language appeared to restrict review to orders entered in Section 242(b) proceedings. If the aim were simply to insure that Section 106(a) review would not be available for exclusion orders, surely a less misleading way would have been found to express that intention. And the decisive consideration is that such a way *was* found. As respondent notes (Br. p. 23), Section 106(b) "included explicit provisions to assure this result"—namely, a declaration that an alien subject to an exclusion order "may obtain judicial review of such order by habeas corpus proceedings and not otherwise." Thus, by the unmistakable language of Section 106(b), the Congress eliminated exclusion orders

from Section 106(a) review, and it is in the highest degree implausible to suggest that the Congress tried to make doubly sure with the wholly inept—for that purpose—language of Section 106(a).

In short, not only does the "pursuant to administrative proceedings under section 242(b)" phrase carry the obvious meaning that orders entered outside the context of a Section 242(b) proceeding are not within the scope of Section 106 (a), but respondent has not suggested any reasonable alternative meaning.

II.

THE OPINION OF THIS COURT IN FOTI v. IMMIGRATION & NATURALIZATION SERVICE FORTIFIES THE LOWER COURT'S INTERPRETATION OF SECTION 106(a).

Although, as we have said, we do not contend that the holding in *Foti v. Immigration & Naturalization Service, supra,* is dispositive of the issue raised in the case at bar, the *Foti* opinion strongly supports the lower court's reading of Section 106(a).

The question in *Foti* was whether a denial of discretionary suspension of deportation under Section 244(a)(5), 8 U.S.C. 1254(a)(5), was directly appealable to the Court of Appeals under Section 106(a). The action had been taken by the special inquiry officer during the Section 242(b) deportation proceedings, so that the narrow question was whether the denial was a "final order of deportation" within the meaning of Section 106(a).

In holding that it was, this Court repeatedly stressed that the action was taken, and had traditionally been taken, as part of the Section 242(b) proceedings. Thus, after reviewing the course of prior administrative practice, the Court said that "the administrative discretion to grant a suspension of deportation has historically been consistently exercised as an integral part of the [deportation] proceedings," and that

"[i]t must be concluded that Congress knew of this familiar administrative practice and had it in mind when it enacted § 106(a)." 375 U.S., at 223. Again, the Court observed that "[i]f anything, the literal language [of Section 106(a)] would appear to include a denial of discretionary relief, made during the same proceedings in which deportability is determined, which effectively terminates the proceeding." *Id.*, at 224. And in relying upon the terms of Section 242(b) to establish a distinction between adjudications of deportability—the only issue the lower court had held appealable under Section 106(a)—and the statutory term "orders of deportation," the Court said that the fact that such a distinction was reflected in Section 242(b) was "of especial relevance since § 106(a), in describing the 'final orders of deportation' intended to be encompassed thereunder, specifically refers to administrative proceedings conducted under § 242(b)." *Id.*, at 228. If, as respondent asserts, the controlling consideration under Section 106(a) is the nature of the order, regardless of whether it is made in the context of a Section 242(b) proceeding, then the Court was underscoring the irrelevant in emphasizing that the *Foti* order had come out of such a proceeding.

But the "most telling distinction between what is reviewable [in the court of appeals] and what is not," as the lower court noted (A. 24a), appears in footnote 16 of the *Foti* opinion.[6] *Id.*, at 229-230. In this part of its opinion, the Court dealt with an argument advanced by the lower court in favor of a restricted reading of Section 106(a). The lower court had reasoned that to bring denials of suspension of deportation within the statute would produce the anomalous result that such orders would be directly appealable to the court of appeals whereas substantially similar orders—those denying the withholding of deportation under Section 243

[6] For a similar view of the relevance of footnote 16 to the issue here presented, see *Yamada v. Immigration & Naturalization Service*, 384 F.2d 214, 216 (9th Cir. 1967); *Cheng Ho Mui v. Rinaldi*, 262 F. Supp. 258, 262 (D.N.J. 1966).

(h), 8 U.S.C. 1253(h)—would be reviewed in the district court, since the latter type of order had not traditionally been entered in a Section 242(b) deportation proceeding. To the suggestion that this result would not obtain because, under recent amendments to the regulations, petitions for Section 243(h) relief also had to be made to the special inquiry officer in the Section 242 proceeding, the Court of Appeals replied that "it would be rather novel that an administrative regulation could bring something within the jurisdiction of the courts of appeals which was not covered by the language that Congress used and which, having given today, the Attorney General can take away tomorrow . . . ." 308 F.2d, at 785.

This Court, in rejecting the lower court's analysis, said not only that Section 243(h) orders made within Section 242(b) proceedings were reviewable under Section 106(a), but also, and most importantly, that orders of this sort made wholly outside Section 242(b) proceedings were *not* reviewable under Section 106(a). Thus, as to the first point the Court stated: "[I]t seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to § 244(e) and orders denying the withholding of deportation under § 243(h), are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a). We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review available in the Courts of Appeals." 375 U.S. at 229-230. As to the second point, and in amplification of its observation about the impact of administrative regulations, the Court in footnote 16 pointed out that, under the regulations in effect at the time of enactment of Section 106(a), the withholding of deportation under Section 243(h) was not determined in Section 242(b) deportation proceedings, and accordingly that "*presumably denials of § 243(h) relief were not covered by § 106(a) at [that] time . . .*" *Id.*, at 230.

Respondent does not dispute that, if determinations respecting withholding of deportation under Section 243(h) were not subject to review under Section 106(a) before those determinations were by regulation entrusted to the special inquiry officer conducting the Section 242(b) proceeding, neither are orders like the one in the case at bar. Moreover, respondent concedes that the Court in footnote 16 of the *Foti* opinion indicated the view that such orders are not appealable under Section 106(a) (Br. p. 14). Respondent says, however, that the Court's observation in footnote 16 was only "tentative" and does not "foreclose the issue" (*ibid.*). Moreover, respondent suggests that the Court's subsequent *per curiam* decision in *Giova v. Rosenberg, supra,* must be read as a retraction of that part of the *Foti* opinion (Br. pp. 14-15). Indeed, respondent claims that "This case is controlled by the holding in *Giova*, and reversal of the judgment below would seem warranted solely on the authority of that case" (Br. p. 27).

We do not quarrel with respondent's first point. The Court is of course not bound by its *dictum*. We urge simply that where, as in *Foti*, the *dictum* was a careful rejoinder to an argument set forth by the lower court in support of its judgment, it is entitled to considerable weight.

We do, however, find rather startling the notion that the holding in *Giova* requires reversal of the judgment below. It is not reasonable to interpret that *per curiam* opinion as an adoption by the Court of the rationale now advanced by respondent—namely, that all orders that bear a substantial relationship to the deportation order are subject to Section 106(a) review.

In the first place, that rationale, as we have indicated, is both inconsistent with the footnote 16 discussion in *Foti* and wholly different from the rationale elaborated by the

Court in *Foti*, which rested in substantial measure upon the fact that the order had been entered in a Section 242(b) proceeding. It is scarcely credible that the Court would so significantly have modified its views—particularly in the face of the problems posed by the statutory language—with a one sentence *per curiam*.

In the second place, as we have also pointed out, the rationale advanced by respondent in this case is newly devised and is inconsistent with the rationale respondent proposed to the Court in *Giova*. In *Giova*, respondent adhered to its view in *Foti* that it would be an "undue strain upon the statutory language to extend it to a 'determination made . . . *'subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation'" (Br. pp. 16-17). But respondent urged that this interpretation of the statute—which would preclude review under Section 106(a) of the order involved in the instant case—did not bar Section 106(a) review of the *Giova* order refusing to reopen the Section 242(b) deportation proceedings, because such an order "is made by the same officer who entered the final order of deportation . . . [or by the Board of Immigration Appeals that reviewed that order] and is directly linked with the original proceedings out of which the deportation order arose." Therefore, respondent concluded, "an order declining to reopen the [Section 242 (b)] proceedings is so intimately and immediately associated with the principal order (the final order of deportation) that it would be pointless to require that the subsidiary directive be treated otherwise than as an adjunct of the principal order—comparable to the denial of a motion for rehearing or reconsideration" (Br. p. 18).

That is a persuasive distinction between orders entered wholly outside a Section 242(b) proceeding, such as the order in the case at bar, and orders refusing to reopen the proceeding, such as the order in *Giova*. We suggest that it

is far more reasonable to conclude that this analysis urged upon the Court by respondent in *Giova* was the basis for its decision than to suppose that the basis was the quite different, and inconsistent, rationale advanced by respondent in this case.

That is the way the lower court viewed *Giova*: "The result in *Giova* is completely consistent with our analysis of *Foti* since motions to reopen are addressed to the special inquiry officer . . . and are part of the deportation proceedings" (A. 24a-25a). The lower court, we submit, was correct.[7]

III.

IT IS NOT UNREASONABLE TO LIMIT SECTION 106(a) APPEALS TO ORDERS MADE IN THE CONTEXT OF A SECTION 242 PROCEEDING, AND SUCH A READING IS SUPPORTED BY THE ONLY DIRECTLY RELEVANT LEGISLATIVE HISTORY.

Apart from *Foti*, there are other reasons the lower court properly followed the plain meaning of the language of Section 106(a). As we now show, the restriction imposed by that language is sensible. Moreover, to the extent there is relevant legislative history, it supports the lower court's reading of the provision.

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[7] *Giova* has been read the same way by other courts in cases involving facts identical to those in the case at bar. See *Tai Mui v. Esperdy*, 371 F.2d 772, 776-777 (2d Cir. 1966); *Cheng Ho Mui v. Rinaldi*, 262 F. Supp. 258, 263 (D.N.J. 1966).

A. Restriction of Section 106(a) Can Be Justified on the Same Basis as Similar Restrictions in Analogous Direct Review Statutes—the Desirability of Permitting Direct Appeals to Courts of Appeals only Where the Agency Has Conducted a Quasi-Judicial Type of Hearing.

A central ingredient of respondent's appraisal of Section 106(a) is the assumption that it makes no sense to prescribe different forms of judicial review for orders that are substantively indistinguishable. Thus, the argument goes, since the sort of order involved in *Foti*—denial of discretionary suspension of deportation sought on hardship grounds—is related in fundamentally the same way to a deportation order as is the sort of order involved in the case at bar, both should travel the same route through the courts and it is unreasonable to suppose that the Congress meant to provide otherwise.

But it is not unreasonable so to suppose. Respondent overlooks the significance of the procedural context in which agency determinations are made. The importance of that consideration is underscored by a comparison of Section 106(a) with analogous judicial review provisions.

1. *The character of other direct review provisions.* The pattern of trial in the district court followed by review in the court of appeals is, of course, the norm in the federal judicial system. Generally speaking, the exceptions fall into two categories: omission of the court of appeals in favor of direct review by this Court, and omission of the district court in favor of direct review by a court of appeals.[8] Direct

[8] For statutes providing for direct appeal to this Court, see, *e.g.*, 28 U.S.C. 1252, 1253; 42 Stat. 168 (1921), 7 U.S.C. 217; 32 Stat. 823 (1903), 15 U.S.C. 29; 18 U.S.C. 3731; 32 Stat. 823 (1903), 49 U.S.C. 45.

For statutes providing for direct appeal from administrative decisions to the courts of appeals, see notes 9, 10, and 11, *infra*.

Review by a three-judge district court, as in the case of review of Interstate Commerce Commission orders, falls for our purposes into

appeal to this Court, justified upon considerations such as the presumed importance of the type of questions involved, does not concern us here. The analogy to Section 106(a) is to be found in those provisions prescribing elimination of the district court stage, not merely because the various provisions are like Section 106(a), but even more obviously because Section 106(a) itself incorporates, with specified exceptions, the procedure of the Hobbs Act, 28 U.S.C. 2341-2352, one of the circuit court review statutes.[9]

Most of the direct review statutes relate to the independent regulatory commissions.[10] Elimination of the district court stage with respect to the orders of those commissions can be justified on the theory that the typical quasi-judicial type of hearing held by them eliminates the need for trial court fact-finding; that a reasonable guaranty of the integrity of the agency's resolution of factual and legal issues is provided by the independent status of its officers and its adherence to the traditional pleading, briefing, argument, and hearing procedures of a trial court; that it is accordingly

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both categories. There is rarely a "trial" in the three-judge court, which functions in almost every case in the same way as a court of appeals would. And the review is followed by direct appeal to this Court.

[9] The Hobbs Act was enacted in 1950, 64 Stat. 1129, 68 Stat. 961, and recodified as 28 U.S.C. 2341-2352 by Section 4(e) of the Act of September 6, 1966, P.L. 89-554, 80 Stat. 378, 621.

[10] The seminal provision was contained in the Federal Trade Commission Act, 38 Stat. 720 (1914), 15 U.S.C. 45(c). Other agencies affected by comparable provisions are the Securities and Exchange Commission, 48 Stat. 80 (1933), 15 U.S.C. 77i, 48 Stat. 901 (1934), 15 U.S.C. 78y, 49 Stat. 834 (1935), 15 U.S.C. 79x, 54 Stat. 844 (1940), 15 U.S.C. 80a-42, 54 Stat. 855 (1940), 15 U.S.C. 80b-13; the National Labor Relations Board, 49 Stat. 455 (1934), 29 U.S.C. 160 (f); the Federal Power Commission, 49 Stat. 860 (1935), 16 U.S.C. 825*l*, 52 Stat. 831 (1938), 15 U.S.C. 717r(b); the Civil Aeronautics Board, 72 Stat. 795 (1958), 49 U.S.C. 1486; the Federal Communications Commission, 48 Stat. 926 (1934), 47 U.S.C. 402, 28 U.S.C. 2341-2347; and the United States Maritime Commission, 52 Stat. 961 (1938), 46 U.S.C. 1181.

unnecessary to provide the right to more than one review; and that courts of appeals are the appropriate tribunals for that review both because an evidentiary hearing is unnecessary and because review of agency orders on the basis of the agency record resembles review of a district court judgment on the basis of the trial court record.

The several statutory provisions prescribing circuit court review of certain actions of agencies within the Executive Branch can be justified in the same way, except of course for the factor of independence of the decision-making officers from either the Executive or the Congress. In each case, so far as we have been able to discover, the agency orders subject to circuit court review are by statute required to be entered only after there has been an opportunity for a full hearing of the type associated with quasi-judicial proceedings.[11]

2. *Legislative history of the direct review statutes.* This view of the direct appeal statutes—that they are explicable largely, or importantly, in terms of the procedures employed by the agency in making the determinations subject to review—is not only a reasonable inference from the character of the statutes, but it has support in legislative history. The direct appeal statutes are modeled upon section 5 of the Federal Trade Commission Act,[12] which was fashioned by the conferees of the House and Senate after each house had passed bills vesting review in the district courts. While the

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[11] Regulation of toll bridge rates by the Secretary of the Army, 49 Stat. 671 (1935), 33 U.S.C. 504, 505; action by the Secretary of Agriculture under the Federal Seed Act, 53 Stat. 1287 (1939), 7 U.S.C. 1599, 1600; revocation by the "Commerce" Board of grants respecting foreign trade zones, 48 Stat. 1002 (1934), 19 U.S.C. 81r; regulation by the Postmaster General of discrimination respecting second-class mail by freight, 39 Stat. 424 (1916), 39 U.S.C. 6212; action by the Secretary of Agriculture under the Packers and Stockyards Act, 42 Stat. 161 (1921), 7 U.S.C. 193, 194, 210, 211, 28 U.S.C. 2341-2347; wage determinations by the Secretary of Labor under the Fair Labor Standards Act of 1938, 52 Stat. 1064, 29 U.S.C. 208, 210.

[12] 3 Davis, Administrative Law, § 23.03 at 302.

legislative history of this provision is sparse, it leaves no doubt that the court of appeals was chosen as the reviewing forum because the essential trial court functions—taking evidence at a hearing and preparing a record complete with findings of fact—were to be performed by the commission. The Conference Report states:

> In order to obtain a speedy settlement of disputed questions, it is provided that the Commission shall apply for the enforcement of its orders directly to the circuit court of appeals. The findings of the Commission as to the facts are to be conclusive. The court's function is restricted to passing on questions of law. The court will determine such questions on the record in the proceeding before the Commission. No new evidence may be adduced on the hearing in court except upon good cause shown, and if the court permits the introduction of additional evidence, such evidence will be taken by the Commission and then filed in court with its new or modified findings based thereon.[13]

Since 1914 Congress has continued to vest trial court functions in newly created agencies and review in the court of appeals, but it has seldom re-articulated its reasons for preferring the court of appeals to the district court. We have found only two such instances.[14] In reporting its bill establishing the Federal Alcohol Administration, the House Finance Committee stated:

> The [review] provision of the bill is similar to that contained in the Packers and Stockyards Act, the Communications Act, the Securities Act, and the Securities Exchange Act as well as the provisions in

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[13] H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914) p. 19. See also the similar explanation given the Senate by one of its conferees, Senator Albert E. Cummings. 51 Cong. Rec. (1914), p. 14768.

[14] We have examined the committee reports of all the statutes identified in notes 9, 10, and 11, *supra*, and the debates respecting some of the most important of them.

> the internal revenue laws under which appeals are taken from the Board of Tax Appeals. . . . Review in the circuit court is thought to be more desirable than review in the district court in order that there may not be the delay and expense consequent upon a lawsuit in the district court and appeal from that court's action to the circuit court of appeals. Further, review of the order is in substance an appellate function which is not within the usual scope of the district court jurisdiction but rather within that of the circuit court of appeals. Review is limited to questions of law as required by the Constitution in the case of a constitutional court . . . . Provision is made, however, by which additional evidence may be adduced before the Administrator even after the case is in court.[15]

And in supporting the review provisions of the Hobbs Act, the House Committee on the Judiciary stated that "the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them, will be presented," so that it would be unnecessary to go "over the same ground twice" by having district court review.[16]

3. *Judicial construction of the direct review statutes.* The desirability of limiting direct review by the courts of appeals to agency orders based upon a quasi-judicial type of proceeding received important expression in *United Gas Pipe Line Co. v. Federal Power Commission*, 181 F.2d 796 (D.C. Cir. 1950), *cert. den.*, 340 U.S. 827. There petitioners sought direct review by the court of appeals of a Federal Power Commission rule respecting the filing of rate schedules. The Commission had followed the rule-making requirements of the Administrative Procedure Act with respect to the submission of written evidence, the holding of a public hearing, and the right to oral argument, but there had been no oral

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[15] H.R. Rep. No. 1542, 74th Cong., 1st Sess. (1935), p. 5.

[16] H.R. Rep. No. 2122, 81st Cong., 2d Sess. (1950), U.S. Code Cong. Serv., p. 4306.

testimony with the right to cross-examine. The Commission "did not hold a quasi-judicial hearing." *Id.*, at 797. The court dismissed the petition, stating that "[o]n its face, the Act contemplates review of a decision based on evidence presented in a quasi-judicial proceeding before the Commission," for it "specifies that the Commission shall file with the proper circuit court of appeals 'a transcript of the record upon which the order complained of was entered. . . .'" The court went on to discuss the importance of such a limitation upon review:

> Review provisions such as 19(b) evidence Congressional recognition that an appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues. The wisdom of thus circumscribing the authority to review is readily apparent in this particular case. For we are asked to . . . make an important decision concerning the scope of the Commission's regulatory authority merely on the basis of allegations in a Petition for Review . . . . Nor do we have the aid of testimony, affidavits, etc. [*Id.* at 798-99.]

See also *Arrow Airways v. Civil Aeronautics Board*, 182 F.2d 705 (D.C. Cir. 1950), *cert. den.*, 340 U.S. 828 (applying the *United Gas Pipe Line* holding to an order of the CAB); *Division of Production, American Petroleum Institute v. Halaby*, 307 F.2d 363, 365 (5th Cir. 1962) (in denying direct review of an FAA order, the court cited *United Gas Pipe Line* and *Arrow Airways* and said that an original action might lie in district court "in which an adequate record can be made"); *Wisconsin v. Federal Power Commission*, 292 F.2d 753, 754-755 (D.C. Cir. 1961). *Cf., Magnolia Petroleum Co. v. Federal Power Commission*, 236 F.2d 785, 791 (5th Cir. 1956), *cert. den.*, 352 U.S. 968; *Humble Oil & Refining Co. v. Federal Power Commission*, 236 F.2d 819 (5th Cir. 1956), *cert. den.*, 352 U.S. 967; *Shank v. Federal Power Commission*, 236 F.2d 830, 834 (5th Cir. 1967), *cert. den.*, 352 U.S. 970.

In thus restricting the scope of direct review statutes to cases in which the court of appeals can perform its traditional role of deciding issues of law upon the basis of an adequate record produced in a quasi-judicial hearing, the lower courts have relied in part upon the following statement by this Court in *Federal Power Commission v. Edison Co.*, 304 U.S. 375, 384:

> The context in § 313(b) indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered." The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

4. *The analogy to Section 106(a).* Against this background, the limitation of Section 106(a) review to those INS orders entered in the context of a Section 242(b) proceeding makes perfectly good sense. Indeed, to construe the statute as respondent seeks would be to depart from the traditional pattern of direct review statutes, for it is Section 242(b), and that section alone, that requires the procedures essential to a quasi-judicial hearing. Thus, in Section 242(b) the Congress has required that the determination of deportability be "made only upon a record made in a proceeding before a special inquiry officer"; that the alien "shall have a reasonable opportunity to be present at the hearing"; that the alien "shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held"; that the alien "shall have the privilege of being represented

(at no expense to the Government) by . . . counsel"; that he "shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government"; and that the special inquiry officer may not have "participated in investigative functions" with respect to the case. Moreover, the statute obviously contemplates that the record of the proceeding be complete and that it be a written record, and therefore the regulations specifically require that the "hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer" and that the record shall consist of "[t]he hearing . . . including the testimony, exhibits, applications and requests, the special inquiry officer's decision, and all written orders, motions, appeals, briefs, and other papers filed . . . ." 8 C.F.R. 242.15.[17] Finally, a section of the Hobbs Act incorporated by reference into Section 106(a) contains a provision paralleling the transcript filing requirement that the court in *United Gas Pipe Line* relied upon.[18]

Moreover, where issues other than deportability are by regulation dealt with in the Section 242(b) proceeding, as was the question of suspension of deportation involved in *Foti*, it is clear enough on the face of the regulations that the same procedural safeguards are applicable even though not required by statute. See 8 C.F.R. 242.[19] That was ev-

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[17] For an excellent example of how courts vigorously enforce quasi-judicial procedural requirements in a Section 242(b) proceeding, see *Chung Yong Chew v. Boyd*, 309 F.2d 857 (9th Cir. 1962).

[18] "Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title." 28 U.S.C. 2346.

[19] The single exception is specified: "In exercising discretionary powers to grant or deny an application under this paragraph, the special inquiry officer may consider and rely upon information not contained in the record, provided the Commissioner has determined that it is in the interest of the national security and safety to do so." 8

idently the practice under previous regulations, see *Jay v. Boyd*, 351 U.S. 345, 351-352, 353, 359-360; and we understand is the practice today. We add that if it were not, under our view of the statute such orders would not be entered "pursuant to administrative proceedings under Section 242(b) of this Act" within the meaning of Section 106(a). It is not merely the office of the person who enters the order that is significant. It is the full range of procedural requirements of Section 242(b) that is controlling.

In contrast to Section 242(b) proceedings, where discretionary relief, such as the stay of deportation involved in the case at bar, is denied wholly outside such proceedings no particular procedure is required by statute. Moreover, the regulations require merely that a request for a stay be made "on Form I-246" and filed with the district director, and that "[w]ritten notice of the disposition of the alien's request shall be served upon him." 8 C.F.R. 243.4. The regulations also explicitly provide that denial of a stay "is not appealable."[20]

In conformity with this regulation, the "record" of respondent's action in this case, as we have noted (*supra* p. 2), consisted simply of a one-page form application for stay

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C.F.R. 242.17(a). See also 8 C.F.R. 242.17(c). A similar provision was upheld in *Jay v. Boyd*, 351 U.S. 345. *Cf. Knauff v. Shaughnessy*, 338 U.S. 537; *Shaughnessy v. Mezei*, 345 U.S. 206.

Because it is not relevant to this case, we do not discuss to what extent the procedural rights guaranteed by Section 242—or perhaps some in addition to those so guaranteed—might be required by the Constitution in connection either with deportation or with denial of discretionary relief. See, *e.g.*, *Jay v. Boyd*, *supra* (dissenting opinions); *Wong Yang Sung v. McGrath*, 339 U.S. 33; *Marcello v. Bonds*, 349 U.S. 302; *Brownell v. Tom We Shung*, 352 U.S. 180, 182 n. 1; *Cakmar v. Hoy*, 265 F.2d 59 (9th Cir. 1959).

[20]The Board of Immigration Appeals can, however, grant a stay in connection with a motion to reopen or to reconsider a determination by the Board, *ibid.*, as can the special inquiry officer under a recent amendment to the regulations, 8 C.F.R. 242.22, as amended by 33 Fed. Reg. 2380.

to which was appended a two-page form statement of grounds petitioner asserted for classification as a refugee, together with a brief letter from the Acting District Director denying the stay. In that letter, as we have also noted, the Acting District Director relied upon grounds that evidently were obtained either from the record of the Section 242(b) proceedings or conceivably from oral conversations that were not transcribed. Moreover, so far as the record discloses petitioner was not represented by counsel in connection with seeking the stay, and there was no intra-agency appeal because the regulation prohibits appeals.

This is far removed indeed from the procedures employed by independent agencies and the procedures required where actions of other Executive agencies are subject to direct review in the courts of appeals. To be sure, the subject of judical review of agency actions defies completely exhaustive research and is sprinkled with exceptions to every rule. But so far as we can tell Section 106(a), if construed as respondent urges, would stand alone in requiring direct review by three judges of a court of appeals of the action of a subordinate agency official not based upon a quasi-judicial type proceeding and not even appealable within the agency. And if it would not stand alone, clearly it would have very little company.

Moreover, the difficulties of extending Section 106(a) to such cases are plain. While in this case there is evidently no dispute respecting the relevant facts or the grounds for the Acting District Director's action, this is merely fortuitous. It takes no great play of the imagination to think of situations involving applications for stays in which the absence of an adequate record would be fatal to informed review by a court of appeals. Stays can be sought on any ground, and without a record it may be impossible for the court of appeals even to tell upon what basis the request was denied, much less whether that basis was supportable in law or in fact.[21]

[21] The problem of defining with precision the scope of judicial review of discretionary orders in deportation cases is complex. See discussion

And the same can be said about the other types of action the INS takes outside of Section 242(b) proceedings, such as the denial of visa petitions seeking preferred immigration status or the denial of applications for waiver of the foreign residence requirement for aliens who were admitted as exchange visitors (see Resp. Br. p. 30). The latter form of relief, for example, can be granted by the Attorney General upon a determination that departure "would impose exceptional hardship upon the alien's spouse or child (if . . . a citizen of the United States or a lawfully resident alien)." If the court of appeals does not know, because there has been no hearing and there is no full record, whether relief was denied because there was no "exceptional hardship" or because the spouse was not a citizen or a "lawfully" resident alien, or what facts were relied upon to support either determination, the court is ill-equipped to review the case.[22]

Thus there is good reason to conclude that the Congress acted advisedly in providing that Section 106(a) is to apply only to orders rendered pursuant to Section 242(b) proceedings, and that the result is not only defensible but desirable.

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and cases collected in 2 Gordon & Rosenfield, *Immigration Law & Procedure* (1967) §§ 8.14-8.15. However, the procedural problems faced by courts of appeals in reviewing orders in the absence of a quasi-judicial agency hearing exist whether the standard of review is the stringent "abuse of discretion" formula appropriate for the act of discretionary judgment itself, the "substantial evidence" standard evidently appropriate for testing a determination that the alien did not meet the statutory qualifications for the grant of discretionary relief, or some intermediate standard. As to the appropriate standards for various types of actions, in addition to the cases cited in Gordon & Rosenfield, *supra*, see *Foti v. Immigration Service*, 375 U.S., at 228.

[22]For a good example of a case in which, because the summary procedures employed by the INS in denying discretionary relief had not produced an adequate record, the court first remanded the case for an evidentiary hearing and then permitted the alien to take depositions, see *Vucinic v. Immigration & Naturalization Service*, 243 F. Supp. 113 (D. Ore. 1965). See also *Attorney General v. Buffalino*, 322 F.2d 1016, 371 F.2d 738 (D.C. Cir. 1963, 1966); *cf. Accardi v. Shaughnessy*, 347 U.S. 260.

5. *A possible objection.* There is, we note, one factor that robs our analysis of perfect theoretical symmetry, but that does not destroy its practical force. A section of the Hobbs Act incorporated by reference into Section 106(a) provides that, where no agency hearing was either held or required, and where there is a material issue of disputed fact, the court of appeals may transfer the case to the district court for trial. 28 U.S.C. 2347(b). Thus, if respondent's construction of the statute were adopted, it is true that the courts of appeals would not be helpless when confronted with a relevant factual controversy. But the single point at issue is whether it is reasonable to attribute to the Congress the purpose apparent on the face of the statute—restriction of direct appeals to orders entered in the context of a Section 242(b) proceeding. In those terms, even apart from the doubtful strength of inferences drawn from a provision incorporated by reference and nowhere mentioned in the legislative history, our position is unimpaired. Surely the Congress could reasonably have thought that expedition would be better achieved on the whole by permitting direct review only where there would be no opportunity for skillful pleaders to secure a *three* stage review—court of appeals, district court, court of appeals—by raising a material dispute of fact. Moreover, a quasi-judicial proceeding does not serve merely to afford a basis for review of factual issues. A trial-type proceeding generally results in a sharpening of the legal issues and in a full disclosure of the grounds upon which the agency takes action. Full disclosure, indeed, is an implicit requirement of Section 242(b) and an explicit requirement of the regulations. 8 C.F.R. 242.18. It was hardly unreasonable for the Congress to have secured to the courts of appeals those aids to appellate review that are traditionally theirs.[23]

[23] It may be noted in this connection that the transfer provision seems superfluous in the Hobbs Act itself. We have, as we have indicated, been unable to identify any type of order reviewable under that Act in which an agency hearing is not required. The provision seems to have been included out of an abundance of caution.

6. *Decisions under Section 106(a).* While we cannot say that any lower court opinion construing Section 106(a) is squarely based upon the foregoing analysis, neither are the opinions barren of any reference to it. The most extensive discussion is contained in Judge Friendly's opinion in *Foti*. He noted that direct review by three judges is "normally applied solely to 'quasi-judicial' agency determinations made on a record available for the court's inspection, and only to some of those"; he pointed to the "comprehensive procedure" and "specification of procedural safeguards" in Section 242(b) in contrast to the sections governing discretionary relief; and he said that to hold that orders denying such relief were within Section 106(a) would "represent a further deviation from the established pattern" of review of administrative actions. 308 F.2d at 780, 782, 788. While he erred in treating as irrelevant the fact that Section 242(b) procedures govern discretionary determinations where those determinations are by regulation made in the context of the Section 242(b) proceeding, this does not destroy the soundness of his basic analysis as it is relevant to the case at bar.[24]

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[24] For similar suggestions respecting the desirability of restricting Section 106(a) review to orders entered pursuant to the procedural requirements of Section 242(b), see *Lam Man Chi v. Bouchard*, 314 F.2d 664, 673 (3d Cir. 1963) (the role of the officer in denying the discretionary relief there involved was "not adjudicatory . . . while an order entered under § 242(b) is the result of an adjudication process. . . ."); *Zupicich v. Esperdy*, 207 F. Supp. 574, 578-580 (S.D.N.Y. 1962) (as to withholding of deportation under Section 243(h), "the role of the Special Inquiry Officer does not involve adjudication, as it does under § 242(b)," and the decision of the Attorney General "is based not only upon the special facts of each case elicited through the administrative proceedings, but also upon information and knowledge obtained through governmental channels," whereas Section 106(a) is addressed to determinations "based on a record in an administrative hearing.").

B. The Only Direct Evidence of Legislative Intent Supports Restricting Section 106(a) Review to Orders Entered in the Context of a Section 242(b) Proceeding.

Since the language of the statute is plain and since the result of according the statute its plain meaning is not unreasonable, but rather promotes a policy reflected in a considerable body of prior legislation respecting judicial review, it is highly unlikely that the committee reports or the debates could justify a different interpretation of Section 106(a) whatever their character. But no problem of that sort arises in this case, because to the extent that there is directly relevant legislative history, it supports our position, not respondent's.

The Government says (Br. pp. 22, 23) that there is in the legislative history no "definitive" or "particularized" explanation of the "pursuant to administrative proceedings under section 242(b)" language of Section 106(a). Indeed, the Government cites no legislative history at all as bearing directly upon that phrase. The record, however, is not entirely barren.

In 1961 during the House debate on H.R. 187, the provisions of which were later added by the House as an amendment to the Senate bill that was enacted as Section 106, Representative Libonati opposed the direct review requirement because he thought the INS proceedings would not lay an adequate basis for appellate review.

> We know that under such a situation they . . . [the court of appeals] cannot inquire as to anything beyond the written record. We know further that no written record would be supplied to the petitioner in that proceeding. It would merely be a systematic method of disposing of the case at the earliest opportunity without any question as to the relevant facts that might be brought into the case by the petitioner in a district court hearing by a Federal district judge. [107 Cong. Rec. 12179.]

In reply, Representative Walter, the chairman of the subcommittee that had conducted the hearings and the manager of the bill, did not deny that a full record was necessary for effective appellate review, but rather said in substance that there would be such a record because of the procedures of Section 242(b).

> MR. WALTER. I respectfully invite the gentleman's attention to the law in section 242, in which the procedure for the examiner is set forth in detail. The gentleman apparently has not seen this section. [*Ibid.*]

He could not have responded in this fashion, of course, had he thought that orders would fall within Section 106(a) even though they had not been entered in the context of a Section 242 proceeding. Nor did any Congressman challenge Mr. Walter's statement on the ground that in some circumstances the Section 242 record would not be relevant to the order appealed under Section 106(a).

To this evidence should be added the consideration that in limited circumstances the INS is authorized to conduct summary deportation proceedings. See 1 Gordon & Rosenfield, *Immigration Law and Procedure* (1967), § 5.11. The most prominent example is Section 252(b), 8 U.S.C. 1282 (b), which permits summary deportation of any alien crewman if it is determined that he "is not a bona fide crewman, or does not intend to depart on the vessel or aircraft which brought him. . . ." Thus, while it is scarcely possible that the Congress meant in Section 106(a) to distinguish deportation proceedings generally from exclusion proceedings, it is not so unlikely that it may have meant to distinguish Section 242(b) deportation proceedings from other types of deportation proceedings; and the key difference between these deportation proceedings is that Section 242 (b) provides a plenary hearing whereas the other provisions permit summary action. See *United States v. Esperdy*, 188 F. Supp. 491 (S.D.N.Y. 1960). And see particularly *Vucinic v. Immigration & Naturalization Service*, 243 F. Supp. 113 (D. Ore. 1965), where the court held Section 106(a) not

applicable with respect to discretionary relief denied in the context of a summary deportation proceeding under Section 252. It is pertinent to inquire whether the respondent would contend that *Vucinic* was wrong and that such an order should be appealable under Section 106(a) because it affects deportation, even though under no theory could it be said to have been entered pursuant to deportation proceedings under Section 242(b) rather than Section 252.

C. The Legislative History Relied upon by Respondent Does Not Support Its Position.

While respondent cites no legislative history dealing directly with the pertinent language in Section 106(a), it does rely heavily upon a chart contained in two House reports and reproduced as Appendix B to its brief. We may be overlooking something, since we get nothing at all out of this chart while respondent claims that it is "decisive" and that it "unmistakably portrayed" the "intent of Congress to include motions for stay of deportation within the coverage of Section 106(a)." (Br. p. 27). But neither on the face of the chart nor in the body of the reports does there appear any statement, or even we think any suggestion, that INS action taken in connection with all of the steps outlined in the chart was to fall under Section 106(a). Indeed, several of the procedures identified in the chart are obviously irrelevant to such review—"election of country by deportee," "private legislation," "assurance of foreign country to accept alien," "termination of proceedings," "voluntary surrender," "departure verified." It is perfectly clear, we submit, that this chart cannot be regarded as anything but an itemization of all of the possible stages in a deportation proceeding without reference to the scope of Section 106(a). Indeed, that is exactly what the Committee said it was: a chart "outlining administrative procedures in deportation cases" printed "for reference purposes." H.R. Rep. No. 423, 86th Cong.

1st Sess., p. 19; H.R. Rep. No. 565, 87th Cong. 1st sess., p. 26.[25]

IV.

THE LOWER COURT'S INTERPRETATION OF SECTION 106(a) WOULD NOT HAVE UNTOWARD PRACTICAL CONSEQUENCES.

Respondent's position is rooted in large measure in its conviction that, if Section 106(a) is construed so as to exclude orders not entered in the context of a Section 242(b) proceeding, the INS will be seriously disabled in its efforts to execute deportation orders promptly. Respondent's major concerns are that in general the addition of another stage of judicial review will produce delays, and also that if the alien is permitted to raise issues both in the district court and in the court of appeals, the resulting "bifur-

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[25] Respondent also states that "the colloquy during the 1959 House debates between Representatives Walter, Lindsay and Moore . . . is highly significant," because it "portrays a clear intent that determinations directly affecting deportation orders, although made after the primary deportation proceeding, would be subject to the exclusive review procedure prescribed by Section 106(a)" (Br. pp. 12-13). Even if true, this would mean no more than that orders such as the motion to reopen the deportation proceeding involved in *Giova* were considered to be within Section 106(a). We take it respondent means no more, and does not rely upon this debate to establish that orders entered wholly outside the deportation proceeding are subject to Section 106(a). Such reliance would be wholly misplaced. Congressman Walter concluded the discussion by stating that the six-month period of limitation—the subject of the colloquy—"applies to the final administrative adjudication of the applications for suspension of deportation *just as it would to any other issue brought up in deportation proceedings.*" Thus, if the discussion means anything, it supports our view that Section 106(a) is limited to issues disposed of in the "deportation proceeding." This was the Ninth Circuit's interpretation. *Yamada v. Immigration & Naturalization Service*, 384 F.2d 214, 216-217 (1967).

For the convenience of this Court, we have reproduced this debate in Appendix C, *infra*.

cation" of review will breed confusion, waste, and even more delay. The point evidently is that if the practical consequences of the lower court's reading of the statute are this undesirable, common sense suggests that the Congress could not have intended that the statute be so read.

But if what we have said to this point is substantially correct, an evaluation of the practical impact of the lower court's decision is not material. It was reasonable for the Congress to qualify its general purpose to secure expedition by a more specific purpose to restrict court of appeals review to orders entered in quasi-judicial proceedings; the language of the statute clearly indicates that is exactly what the Congress intended, and such legislative history as there is also supports that view. The resulting delays, accordingly, must be regarded as the price to be paid for adhering to traditional patterns of judicial review; and if "bifurcation" is in some circumstances another result, it too must be tolerated. As this Court said in another case in which it held that the statute permitted no escape from a bifurcated review of certain SEC orders, "Whether a better procedure could be devised is not for us to determine." *General Protective Committee v. Securities & Exchange Comm'n*, 346 U.S. 521, 535-36.

But in any event, as we now show, the probable practical consequences of the lower court's decision do not argue against its affirmance.

A. The Effect of the Lower Court's Decision in Terms of Speedy Judicial Review.

Regrettably, it is not possible to measure in any reasonably precise way the consequences of the lower court's decision upon the speed with which deportable aliens can be ushered out of the country. Respondent starts out ahead on this point, since in any given case the probabilities are that, if district court review can be avoided, the end of litigation is closer than if it cannot. But not necessarily. If the challenge

to the order raises a substantial issue of fact, then as we have noted (*supra*, p. 30) the court of appeals would have to invoke the transfer provision of the statute to remand the case to the district court for trial, to be followed by appeal—a three-stage review. Since there is no way of knowing what proportion of cases in the past have involved factual disputes, and no way of predicting how the incentive of this additional delay would affect that proportion in the future, there is no way of assessing the overall net gain in expedition that would be produced under respondent's construction of Section 106(a).

The problem is further complicated by the fact that Section 106 cannot possibly be read to eliminate two-stage review in all situations. In Section 106(a)(9), the Congress specifically preserved *habeas corpus* for aliens held in custody, and in Section 106(a)(5) it provided a district court *de novo* trial for substantial claims of United States nationality. This carves out a large block of cases in which initial review will necessarily be in the district courts.

Moreover, it should be noted that much less is at stake in this case than was in *Foti*. As the Court noted in *Foti*, "[d]eportability is conceded in about 80% of the cases." 375 U.S., at 227 n. 13. Accordingly, had Section 106(a) been limited to review of the question of deportability, it would have been applicable in but 20% or so of the contested cases. But the impact of restricting direct review to orders entered in the context of Section 242(b) proceedings would be far less substantial, since by regulation most determinations respecting discretionary relief are now passed upon in the Section 242(b) proceeding and hence fall within Section 106(a) under *Foti*.[26]

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[26]The respondent in a Section 242(b) proceeding may apply to the special inquiry officer for suspension of deportation under Section 244 (a), for adjustment of status under Section 245, for creation of a record of lawful admission for permanent residence under Section 249, for voluntary departure in lieu of deportation pursuant to Section 244(c), or for temporary withholding of deportation pursuant to Section 243(a). 8 C.F.R. 242.17(a), (b), and (c).

Finally, should the INS conclude that direct review even of this remaining group of orders is essential, the INS can insure such review by amending its regulations to require that these orders be entered in the Section 242(b) proceeding just as it has done with respect to other forms of discretionary relief. This is the solution proposed by the Ninth Circuit Court of Appeals in *Yamada v. Immigration and Naturalization Service*, 384 F.2d 214, 217 (1967).

Respondent concedes that this sort of change in administrative practice might to some extent be possible and desirable, but sees two principal difficulties. First, respondent says that some matters "usually can best be handled by district directors rather than special inquiry officers" (Br. p. 42). We have no way of evaluating the practical administrative problems in transferring duties from district directors to special inquiry officers. But even if those probems are substantial, there seems to be no reason why the regulations could not grant the alien the right to appeal to the special inquiry officer from an adverse determination by the district director, with all of the procedures of Section 242(b) coming into play at that point. If such a right were granted, the denial of the requested relief, if affirmed by the special inquiry officer and the Board of Immigration Appeals, would fall within Section 106(a) under *Foti*.

The INS' second objection to the amendment of regulations approach is that it would not be effective to secure direct review where the discretionary relief is sought after the termination of the Section 242(b) proceedings, and that such a delay is fairly typical because many of the applications for relief are based upon changed circumstances (Br. pp. 42-43). But we do not see the problem. All that would be required would be an amendment of the regulations permitting such issues to be raised by way of a motion to reopen the Section 242(b) proceeding. Under *Giova*, the questions would then be subject to Section 106(a) review.

B. The "Bifurcation" Problem.

An analysis of the problem of "bifurcated review" should begin with a precise understanding of what it is and what it is not, particularly as distinguished from successive judicial review proceedings. No one contends that Section 106(a) can be interpreted in such a way as to insure that there will be but one court action in every deportation case. As respondent points out (Br. pp. 39-43), what it terms "subsequent determinations" respecting discretionary relief often can quite properly be sought by aliens after the close of the deportation proceedings, and even after the close of judicial review of one or more issues raised in those proceedings. Accordingly there can quite properly be more than one judicial action. As respondent also correctly observes, the Congress "nowhere stated that it was restricting every litigant to one proceeding" (Br. p. 39).

While respondent's reading of Section 106(a) would result in each successive contest being heard in the court of appeals, whereas our reading would permit one review to be heard in one court and a later in another depending upon the procedural context in which the challenged determinations are made, if this is "bifurcation" it cannot be regarded as particularly serious. About all that could usually be said would be that some general knowledge about the case would go to waste; but even this assumes that the second action, if brought directly in the court of appeals, would be heard by the same panel that decided the first.

Moreover, it may be noted that this type of "bifurcation," if that be what it is, may also occur under respondent's view of Section 106(a). Respondent concedes that what it terms "antecedent determinations"—"determinations leading to the institution of proceedings" such as denial of an application for an extension of a temporary stay—cannot be appealed under Section 106(a) "[w]hen there has been no deportation proceeding or order" at the time review is sought (Br. pp. 25, 31 n. 16). There are a number of different determinations of this sort. See, e.g., 8 C.F.R. 103.1(e). If a depor-

tation proceeding is instituted and results in a deportation order after district court review of such an "antecedent" order, issues involved in that proceeding would be appealable to the court of appeals. Hence there would be "bifurcation" in the sense of successive initial reviews of different issues in different courts. (And what would be the result if the Section 106(a) petition were filed *prior* to termination of district court review?)

The type of "bifurcation" that may reasonably be viewed as a significant problem occurs where discrete issues arising out of the INS' efforts to deport an alien are reviewed *simultaneously* by two different courts. But even in such a case "bifurcation" need not be as bad as it sounds. Where an alien files a petition in the court of appeals as to some issues and a complaint in the district court as to others, the sensible thing for the court of appeals to do is simply to defer the hearing of the Section 106(a) petition until disposition of the case in the district court. Any appeal from the district court's judgment can then be consolidated with the Section 106(a) petition. Admittedly, this expedient would not be available if the district court suit were brought in a different circuit than the Section 106(a) proceeding. In such circumstances, however, it is hard to believe that the district courts would not entertain sympathetically motions by respondent to transfer venue under 28 U.S.C. 1404.[27]

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[27]There seems no danger that the Section 106(a) petition might have been filed in a circuit not embracing any district in which the district court action "might have been brought" within the meaning of 28 U.S.C. 1404. Under Section 106(a)(2) the venue of petitions for review is "in the judicial circuit in which the administrative proceedings . . . were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner." Declaratory judgment actions against the INS can, under 28 U.S.C. 1391(e), be brought in the district in which the plaintiff resides or in which the cause of action arose. See 2 Gordon & Rosenfield, *Immigration Law and Procedure* (1967), § 8.9(a).

More importantly, however, "bifurcation" of the sort that may cause difficulties need not result at all. If the INS amends its regulations in the fashion previously described, all issues affecting the deportation order will be appealable under Section 106(a). Moreover, even absent changes in the regulations, the ancillary jurisdiction doctrine may be employed to prevent bifurcation. As respondent said in its *Foti* brief (p. 7 n. 5), "where the petition for review challenges both the determination of deportability and the denial of discretionary relief, the court of appeals has jurisdiction, under the principle of 'pendent jurisdiction' (cf. *Hurn v. Oursler*, 289 U.S. 238; *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 380-381), to hear and determine the entire controversy. See *Lefson v. Esperdy*, 211 F. Supp. 769 (S.D.N.Y.), and *Pezzulich v. Esperdy*, unreported (S.D.N.Y., 60 Civ. 497, decided February 23, 1962), so holding." By the same token, where the alien seeks review under Section 106(a) of issues decided in the Section 242(b) proceeding, the court of appeals has ancillary jurisdiction to determine other issues that otherwise would be reviewable in the district court in the first instance.[28] Re-

[28] The Court of Appeals for the Seventh Circuit seems to have applied the ancillary jurisdiction doctrine to support review of discretionary determinations even where it considers that there is no "final order of deportation" within the meaning of Section 106(a) that has been appealed. See *Blagaic v. Flagg*, 304 F.2d 623 (1962); *Melone v. Immigration & Naturalization Service*, 355 F.2d 533 (1966); *Skiftos v. Immigration & Naturalization Service*, 332 F.2d 203, 204 (1964); *Roumeliotis v. Immigration & Naturalization Service*, 304 F.2d 453 (1962). The Government disclaimed any such theory in *Foti* (Br. pp. 48-49 n. 28) and does not urge it here as a basis for jurisdiction. We know of no authority whatever for the notion that a court can assume ancillary jurisdiction over an issue because of the relationship of that issue to another issue *that is not raised.* Rather, the law seems clear that, where there is no primary issue of which the court has jurisdiction, there is nothing to which any other issue can be ancillary, and the court is barred from adjudicating the so-called "ancillary" issues. See, *e.g.*, the discussion and cases cited in 1 Barron & Holtzoff, *Federal Practice and Procedure*, § 23; 2 *Cyclopedia of Federal Procedure* (1965 ed.), § 2.417.

spondent seems to regard this doctrine as applicable to "antecedent orders" where a deportation order is subsequently entered and appealed (Br. pp. 26, 30). There is no reason why it would not be equally applicable to "integral" and "subsequent" orders, to use the respondent's terminology.

Finally, it is worth noting that respondent has not cited any actual examples of bifurcated appeals despite the fact that two of the three courts of appeals most heavily engaged in deportation cases—the Second and the Third Circuits (see *infra* p. 42)—have rejected respondent's view of Section 106(a). Evidently those courts are either adopting satisfactory procedures to deal with the problem, or they are applying the ancillary jurisdiction doctrine to eliminate the problem, or the problem is theoretical rather than real.

C. Burden on the Courts of Appeals.

Respondent discerns in the lower court's decision an "unexpressed, but implicit" concern about being overburdened if Section 106(a) were broadly read (Br. p. 34). Whatever the lower court's fears, this issue seemed relevant, and we therefore asked the INS to secure whatever data were available. The INS responded generously and promptly, and the resulting tabulations, together with an explanatory memorandum by the INS, are attached hereto as Appendix B.

At first glance, the data seem to show that a large number of cases would be controlled by this Court's decision. Thus, in the three-year period from March 1, 1965 to February 29, 1968, 975 such cases were brought in either the district court or court of appeals, in contrast to but 328 cases not affected by the jurisdictional question presented here. Moreover, 677 of those 975 cases were in the Second Circuit, 142 in the Third Circuit, and 102 in the Seventh Circuit.

Two factors, however, indicate that the problem is not as serious as might appear. First, the INS points out in its memorandum that "704 of the above 975 cases . . . involved

aliens of Chinese ancestry who collectively only raised two or three substantive issues," and that "scores of these cases are usually resolved by the decision in a single case. . ." (*infra* p. B-2). The validity of that observation is supported by the record in the case at bar, where as respondent notes (Br. p. 4 n. 6) "[b]y stipulations and courts orders in the Third Circuit, approximately 119 pending cases are covered by the disposition of the *Chung* (No. 637) and *Kwok* (No. 638) cases. Of these, 45 are controlled by *Chung*, 69 by *Kwok*, and five by both cases."

Moreover, even if all of these cases were brought in the district courts, many of them would probably be appealed. While there is reason to believe the number of appeals in immigration cases is rather small,[29] where there is an appeal the case ultimately occupies the time of four judges.

In short, while it seems clear enough that acceptance of respondent's position would result in some additional burden on the courts of appeals, we do not believe the available evidence establishes that this burden would be so extraordinary that it should be presumed that the Congress could not have intended it.

D. Impetus Toward Consolidation of Issues in One Proceeding.

The Ninth Circuit Court of Appeals considered important the fact that, if direct review turns upon whether issues are decided in a Section 242(b) proceeding, the INS will have an incentive to amend its regulations to place more discretionary determinations within that proceeding. This, in turn, would tend to reduce multiple litigation, since the various

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[29] Regrettably, the only data we could find are rather old. Those data are INS figures indicating that in 1957 only 13 of 215 district court cases went to the courts of appeals and in 1956 only 12 of 165. Hearing before Subcommittee No. 1 of the House Committee on the Judiciary, 85th Cong., 2d Sess., on H.R. 13311, July 10, 1958, pp. 7-11.

issues could be consolidated in a single petition for review at the termination of the Section 242(b) proceeding. And, the court observed, one of the concerns of the Congress was multiple litigation. See the detailed discussion in *Yamada v. Immigration & Naturalization Service*, 384 F.2d 214 (1967).

As we show later, it is certainly true that the Congress regarded repeated court actions challenging various orders of the INS as undesirable. And we have already discussed the INS' objections to the practicability of amending its regulations in the fashion visualized by the Ninth Circuit. We do concede that such modifications of procedure would not by any means eliminate multiple litigation, since petitions for discretionary relief are often based upon factual or legal developments occurring after termination of the Section 242 (b) proceeding. However, we do not understand the respondent to contend that no benefits whatever would be realized from revisions in the regulations. Accordingly, it seems clear enough that at least some substantial collateral advantages in the way of minimizing successive lawsuits could be secured as a consequence of the lower court's interpretation of Section 106(a).

E. The Virtues of a Certain Rule.

If the unhappy experience of judicial consideration of Section 106(a) teaches anything beyond the desirability of better legislative draftsmanship, it is the essentiality of a simple and clear rule for identifying Section 106(a) issues. Under the lower court's approach, an order is directly appealable under Section 106(a) if, but only if, it is decided either in the Section 242(b) proceeding or, as in *Giova*, in a motion to reopen that proceeding. That is about as workable a rule as can be devised. Under respondent's approach, the test is the more amorphous consideration of "the application's relationship to the deportation order" (Br. p. 31). While that standard is clear enough with respect to applications for the suspension or the stay of a deportation

order, respondent admits that "the practical situation is somewhat different . . . in regard to subsequent determinations which do not deal directly with a deportation order, but which would eventually result in its mitigation or extinction. Examples . . . are the denial of visa petitions seeking preferred status . . . . and of applications for waiver of the foreign residence requirements for aliens who were admitted as exchange visitors . . ." (Br. p. 30). Plainly enough, if the Court adopts respondent's interpretation of Section 106(a) with respect to orders denying stays, but does not go further and catalog other representative orders of the different types identified by respondent as falling within or without Section 106(a), another round of litigation is in prospect.

V.

RESPONDENT'S EMPHASIS UPON THE PRIMARY ROLE OF SECTION 106(a) IN SECURING EXPEDITION IS MISPLACED.

Respondent's position respecting Section 106(a) is apparently influenced in some measure by its conception of that provision as the "crucial" and "primary" aspect of the 1961 legislation. It is true that this characterization of the provision gains support from this Court's remark in *Foti* that the "key feature of the congressional plan" was the elimination of district court litigation. Perhaps the Court meant simply that this was the "key feature" of subsection (a) of Section 106, not of the entire statute. At any rate, it was not important in *Foti* to draw fine adjectival lines in terms of whether the direct review provision was a "key," "significant," or "material" element in the legislative plan. Nor is it important here, in view of the considerations we have already discussed. However, since respondent evidently thinks otherwise, we have included in Appendix A hereto a detailed examination of the legislative history that demonstrates that the direct review provision was not regarded

by the Congress as the main weapon it was giving to the INS in the Section 106 package. At this point, we merely summarize the most salient points in our analysis.

On the face of the statute, it is clear that the Congress devised a battery of procedural safeguards to obviate what it considered abuses of the judicial process in deportation cases. Thus, in addition to the subsection (a) elimination of district court review, the Congress in subsection (a)(1) imposed a 6-month statute of limitation; in subsection (b) restricted review of exclusion orders to *habeas corpus* proceedings, thereby overturning this Court's decision that such orders could be reviewed in declaratory judgment actions (*Brownell v. Tom We Shung*, 352 U.S. 180); and in subsection (c) required exhaustion of administrative remedies and strict application of *res judicata* in both *habeas corpus* and Section 106(a) review proceedings, and precluded any judicial review once the deportation is accomplished.

The committee reports and the debates indicate that, among these various provisions, the Congress did not regard elimination of district court review as the most important. What troubled the Congress was that some notorious aliens —by virtue of what the House, at least, considered overly liberal court decisions—had avoided deportation for many years by bringing numerous successive lawsuits, both by way of declaratory judgment and by way of *habeas corpus*, challenging different aspects of the issuance of deportation orders. Accordingly, the principal focus of the Congress was on the exhaustion of remedies requirement, the six month statute of limitation, and the application of *res judicata*. Also, the Congress was concerned that, if exclusion orders could be tested in declaratory judgment proceedings as this Court had held, undesirable aliens would be able to enter the country and be at large during the often protracted course of judicial review. The limitation of such aliens to *habeas corpus* proceedings was designed to prevent that.

In short, while the direct review provision was *one* of the measures designed to expedite deportation, it was not regarded by the Congress as the "primary" measure.

CONCLUSION

For the reasons given above, the judgment of the lower court should be affirmed and the case remanded to the Court of Appeals for dismissal of the petition for lack of jurisdiction.

Respectfully submitted,

William H. Dempsey, Jr.
Amicus Curiae

Of Counsel:

Shea & Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005